1992

Utah State Retirement v. Priceview : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT

STATE OF UTAH

UTAH STATE RETIREMENT BOARD, as trustee of UTAH STATE RETIREMENT FUND, a common trust fund, Plaintiff/Appellee, v. PRICEVIEW, LTD., a Utah limited partnership; PRICE K.M., a Utah limited partnership; FRANZ C. STANGL, III, individually and as Personal Representative of the Estate of ELIZABETH ANN STANGL; and JOHN DOES 1 THROUGH 20, Defendants/Appellants.	:	Case No. 900302

SUPPLEMENTAL BRIEF OF APPELLANTS

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
CARBON COUNTY, STATE OF UTAH

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JURISDICTION

This is an appeal from a judgment of the Seventh Judicial District Court. This Court's jurisdiction is based on Utah Code Ann. § 78-2-2(3)(j) (1992) and Rule 3 of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in refusing to allow evidence concerning the parties' intent in entering into the partnership agreement and loan transaction.

Standard of Review: The appropriate standard of review is the "correction of error" standard, with no deference being

given to the trial court's conclusion of law. Williams v. Miller, 794 P.2d 23, 25 (Utah Ct. App. 1990). When reviewing a finding based solely on written materials, the appellate court is in as good a position as the trial court to examine the evidence de novo. In re Infant Anonymous, 760 P.2d 916 (Utah Ct. App. 1988).

2. Whether the trial court erred in refusing to allow evidence concerning the illegality of the loan.

Standard of Review: The appropriate standard of review is the "correction of error" standard, with no deference being given to the trial court's conclusion of law. Williams v. Miller, 794 P.2d 23, 25 (Utah Ct. App. 1990).

3. Whether the trial court erred in allowing interest on the judgment amounts to be compounded monthly when the notes did not explicitly call for compound interest.

Standard of Review: The appropriate standard of review is the "correction of error" standard, with no deference being given to the trial court's conclusion of law. Williams v. Miller, 794 P.2d 23, 25 (Utah Ct. App. 1990).

4. Whether the trial court erred in entering partially duplicative judgments against Stangl individually.

Standard of Review: The appropriate standard of review is the "correction of error" standard, with no deference being given to the trial court's conclusion of law. Williams v. Miller, 794 P.2d 23, 25 (Utah Ct. App. 1990).

5. Whether the trial court erred in refusing to recuse itself.

Standard of Review: The appropriate standard of review is the "correction of error" standard, with no deference being given to the trial court's conclusion of law. Williams v. Miller, 794 P.2d 23, 25 (Utah Ct. App. 1990).

DETERMINATIVE STATUTES

1. Utah Code Ann. § 49-9-12 (1981 & Supp. 1986), reproduced as Exhibit E in the Addendum hereto.

2. Utah Code Ann. § 78-37-1 (1992), reproduced as Exhibit F in the Addendum hereto.

RELATED APPEAL

Appellant earlier appealed from the trial court's Partial Summary Judgment and Order and Decree of Foreclosure which was certified as final under Rule 54(b) of the Utah Rules of Civil Procedure. That appeal has been briefed. This appeal was consolidated with the earlier appeal.

STATEMENT OF THE CASE

In 1988, the Utah State Retirement Fund ("the Fund") commenced this judicial foreclosure action against defendants. Included in the Fund's claims for relief were claims against Franz C. Stangl, III, and Elizabeth Ann Stangl (now deceased) on their guaranties, claims against Stangl and Price K.M. as general partners, respectively, of Price K.M. and Priceview, Ltd. The Fund sought other relief relating to the dissolution of

Priceview, Ltd. such as an accounting and payment of partnership distributions.

In August 1988, the trial court granted the Fund's motion for the appointment of a receiver and sua sponte struck defendants' tenth and eleventh defenses. See Order Granting Plaintiff's Motion for Appointment of Receiver and striking the Tenth and Eleventh Defenses of Defendants' Answer, dated September 12, 1988 (Exhibit 8 to Addendum of Brief of Appellant dated March 28, 1991).

On January 31, 1990, the trial court entered summary judgment in favor of the Fund on the issue of the Fund's entitlement to foreclose and on the Stangls' guaranties. See Partial Summary Judgment and Order and Decree of Foreclosure dated January 31, 1990 (Exhibit A to Addendum hereto). Reserved for trial was the issue whether any defendants would be liable for a deficiency judgment following the foreclosure sale of the property based on defendants' impairment of collateral defense.

Prior to the trial, defendants filed an Affidavit of Recusal and Certification of Counsel. The trial court entered a Finding Relative to Sufficiency of Affidavit of Recusal dated May 15, 1990 (finding it to be insufficient), and certified the Affidavit to the Honorable Don V. Tibbs of the Sixth Judicial District for review. Judge Tibbs denied the request for recusal. See Exhibits 13 and 14 to Addendum of Brief of Appellant dated March 28, 1991.

Trial to the court was held on January 30, 1991. The court thereafter issued a Memorandum Decision on Trial Matters dated March 1, 1991 (Exhibit D to Addendum hereto), entered Findings of Fact and Conclusions of Law (Exhibit C to Addendum hereto) and a Judgment dated June 13, 1991 (Exhibit B to Addendum hereto).

Defendants thereafter timely filed their Notice of Appeal to this Court on July 12, 1991.

STATEMENT OF FACTS

The facts underlying the dispute between the parties in this appeal are fully set forth in the Statement of Facts in the Brief of Appellant dated March 28, 1991. Since these appeals have been consolidated, defendants respectfully refer the Court to the Statement of Facts in the original Brief of Appellant.

Additional procedural facts are set forth above, and critical testimony is set forth throughout the argument section of this Brief.

SUMMARY OF ARGUMENT

The conduct of the parties reveals an ambiguity in the partnership agreement and loan transaction that does not exist on the face of the documents. Specifically, Stangl believed that the Fund intended to make an equity investment, not a loan, but that a "loan" was structured to provide valuable tax benefits to Stangl. Stangl did not intend to contribute $500,000 worth of property in exchange for a 20% partnership interest and sole personal liability on a $4,350,000 loan while the Fund

contributed $100 for an 80% partnership interest and assumed no risk of loss. In addition, the Fund carried the transaction on its books as an equity, not as a loan, and not as a mixed equity/loan transaction. It was not until the shopping center suffered financial difficulties that the Fund considered the transaction a true loan. Thus, the court erred in not allowing or considering evidence of the parties' true intent. Their conduct created an ambiguity which should have been explained through the introduction of extrinsic evidence.

The Fund did not have the authority to make a loan to the partnership. Under Utah Code Ann. § 49-9-12(h) (1981), the Fund only had the authority to make loans secured by Federal Housing Administration or Veterans' Administration insurance. Accordingly, the loan was ultra vires and void. The court's interpreting the transaction as a loan was in error because it denied giving the transaction a legal effect.

The court erred in allowing the Summary Judgment and the Judgment to bear interest compounded monthly. The notes do not explicitly (or even implicitly) allow compounding. In fact, the notes only provide that when the principal balance is accelerated, any then accrued but unpaid interest will be added to the outstanding principal and that amount will then bear interest at 18% before and after judgment. Utah law does not allow the compounding of interest unless the agreement explicitly so provides.

The court improperly entered duplicative judgments against Stangl. While Stangl may be subject to personal liability in different capacities, that is, as a general partner and as a guarantor, that does not mean he should have two judgments pending against him for the same liability.

The court refused to recuse itself when requested to do so by Stangl before trial. At trial, however, the court's bias against Stangl and Stangl's position was fully revealed. The trial court should have recused itself.

ARGUMENT

I.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW EVIDENCE OF THE PARTIES' INTENT IN ENTERING THE TRANSACTION.

The trial court erred in ruling that the partnership agreement and loan documents were unambiguous as a matter of law and in refusing to allow parol evidence to show the parties' true intent. Although the general rule is that a court will not allow parol evidence to vary the terms of a written agreement which appears to be unambiguous on its face, there are several exceptions to this rule. For example, parol evidence is allowed to explain the meaning of documents when: (1) both parties to the contract demonstrate a different meaning by their actions; and (2) a latent ambiguity exists.

A. The parties' conduct created an ambiguity because they both treated the transaction as an equity investment.

The trial court erred in not allowing parol evidence to explain the ambiguity in the documents which was caused by the parties' conduct. The Utah Supreme Court in Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266 (Utah 1972), stated that if parties to a contract have demonstrated by their actions that an agreement means something different from that stated in writing, the actions of the parties create an ambiguity and the intent of the parties should then be enforced.

In Bullfrog, the parties entered into two separate agreements which provided for the leasing of houseboats. The agreements consisted of an employment agreement, by which the defendant became an employee of the plaintiff, and a lease, by which the defendant leased to the plaintiff three houseboats for two years. The purpose of the separate agreements and the structure of the transaction was to circumvent requirements of the National Park Service with respect to concessions. After about one year, the Park Service began inquiring into the operation and it appeared that the parties might not be able to continue the houseboat rental operation under the current system. The defendant then canceled the employment agreement pursuant to its terms and also canceled the lease and removed the three houseboats to another marina in order to continue his business. The plaintiff, however, brought this action asserting that the defendant did not have the right to remove the houseboats from the plaintiff's marina because the lease clearly provided that

plaintiff was to have use of the houseboats for two years. This Court affirmed the trial court, which allowed the admission of parol evidence to explain the documents, because the parties had treated the transaction not as an employment situation and a lease, but as the defendant's operating a separate business. In so holding, this Court stated that

> when parties place their own construction on their agreement and so perform, the court may consider this as persuasive evidence of what their true intention was. It is true that the doctrine of practical construction may be applied only when the contract is ambiguous; but the question becomes ambiguous to whom? Where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation, the parties by their actions have created the ambiguity to bring the rule into operation. If this were not the rule, the courts would be enforcing one contract when both parties had demonstrated that they meant and intended the contract to be quite different.

Id. at 271 (emphasis added).

In Bullough v. Sims, 400 P.2d 20 (Utah 1965), this Court also held that parties to an agreement can create an ambiguity by their actions. The parties in Bullough entered an agreement which unambiguously and clearly provided for a present sale of the plaintiffs' interests in a partnership as of the date of the agreement and at the price which the partnership shares were then worth. The agreement further provided that until demand was made for payment, the partnership would pay the appropriate share of

profits to each of the plaintiffs and the plaintiffs could not interfere with management of the partnership. After more than twenty years, the plaintiffs demanded payment for their partnership shares at the present value, which had substantially increased. The defendant, however, tendered only the value of the shares as of the date of the agreement, relying on the language in the agreement.

Over a period of many years, the parties evidenced their intention as to the meaning of the agreement that there had not been a sale at the time the agreement was entered, but that they contemplated operation as co-owners, and that the shares were to be sold at market value as of the date of sale. Although this directly conflicted with the clear language in the written agreement, the court allowed parol evidence to vary the terms of the written agreement because "the parties by their actions have created the 'ambiguity' required to bring the rule into operation." Id. at 23. The court further stated that

> [t]his rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.'. . . Thus, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced.

Id. (emphasis added).

This Court also held in EIE v. St. Benedict's Hospital, 638 P.2d 1190 (Utah 1981), that if the parties demonstrate by their actions a meaning different from that expressed in a written agreement, the intent of the parties should be enforced. In EIE, the parties entered an agreement under which the plaintiff would provide paramedic services for the defendant. The agreement clearly stated that the defendants would pay plaintiffs "the amount of $90.00 per call." Id. at 1192. Throughout the relationship, however, the parties construed the defendant's obligation to be payment of 90% of the total amount billed for paramedic services, not $90.00 per call as provided in the agreement. The $90.00-per-call figure came about because the parties originally thought that each call would be billed at $100.00, thus making the $90.00 equal to 90%. The plaintiff never objected to these payments until their relationship began to deteriorate. At that time, the plaintiff made demands upon the defendant for amounts allegedly due under the $90.00-per-call provision.

Although noting the general rule that a complete and clear agreement which the parties have reduced to writing will not be varied by parol evidence, the court allowed parol evidence to show that the parties intended that the plaintiff was to receive only 90% of the total amount billed for paramedic services. The court stated that "[t]hough arguably clear on its face, where the parties demonstrate by their actions that to them the contract

meant something quite different, the intent of the parties will be enforced." Id. at 1195 (citing Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266 (Utah 1972)). See also Concerning the Application for Water Rights of the Town of Estes Park v. Northern Colorado Water Conservancy Dist., 677 P.2d 320, 327 (Colo. 1984) ("It is also well-established that the parties' construction of a contract before a dispute arises is a particularly persuasive aid in determining the true meaning of the agreement).

In this case, although the loan documents appear to be unambiguous, the parties consistently treated the transaction as an equity investment. During the trial, Mr. Stangl proffered testimony that the parties' intent was that the Fund would invest the $4,350,000 in the shopping center as an equity. The only purpose for structuring the agreement as a loan was to provide certain tax benefits to Mr. Stangl. Mr. Stangl testified by proffer[1] his understanding of the partnership/loan transaction with the Fund:

> Q. [By Mr. Hunt] Okay. Now, with respect to the partnership agreement that was entered into between you and The Fund about the same time, Exhibit P-4, what did you contribute to that partnership?

---

[1] Although the Court emphasized that it had earlier ruled that the partnership agreement and loan documents presented no ambiguity, the Court allowed a proffer of testimony and evidence. (Trial transcript of January 30, 1991 at 60-61).

. . .

A. The $500,000 worth of land and improvements.

Q. And what did you do, give a deed to the partnership or something of that--

A. Yes.

Q. And what was your understanding what The Fund--What did you get back for your contribution of that land?

A. Twenty percent participation in the partnership.

Q. Okay. Now, what did the Retirement Fund contribute to the partnership?

A. $100 and a loan for $4,350,000.

Q. And what was your understanding of what The Fund got for that contribution?

A. Ownership of 80 percent of the shopping center and the property that the partnership owned.

. . .

Q. Now, I note as part of Exhibit D-9, there are--there's a-- We have loan--basically some loan documents; a note, deed of trust, security instruments and personal guaranty. Given the fact that you created a partnership, why did you also have loan documents? Did you have any understanding of that?

. . .

A. There were several reasons. The first and most important one was a scorekeeping method for the Retirement

Fund to keep track of what their involvement with the shopping center was. They needed a conventional method of keeping score, so that they could keep track of what payments were made, if you will, of the preferential method of who got paid what out of the proceeds that were generated when the center was done.

In addition to that, there were special tax benefits that the Retirement Fund was a non-taxable entity, and that they had no desire or ability to get the tax benefits that flowed from the shopping center. It was a significant part of the bargain, that I was to receive a hundred percent of those tax benefits. And the only way that I could receive a hundred percent of those tax benefits was to be at risk, which meant "sign a note." I signed a note in order to get those benefits.

There were other reasons for the other documents that are involved here, but those were the two main purposes for the reason for the note and the reason for the partnership agreements, the way it was drawn.

Q. With respect to those personal guaranties that you and your wife, Elizabeth--your late wife, Elizabeth, signed, did you understand that that exposed you to risk and you might be required to actually pay money under those guaranties?

A. No.

Q. Why was that?

A. I had a provision in the partnership agreement that allowed me, in the event that things went to hell in a handbasket, that the earth opened up and swallowed the shopping center, that I could distribute in kind to my partner, the shopping center and they would have a hundred percent of the shopping center and I would have nothing. I was willing to accept that risk. I was not willing to pay for one hundred percent of the debt of an empty shopping center to a partner, who's the lender, and get back nothing but paid receipts, and in the end have to give them 80 percent ownership in the property that I had to pay for. It was never part of the bargain; it was never negotiated. It never entered my mind in any way that that was going to be required to do so.

(Trial transcript of January 30, 1991 at 73-77 (emphasis added)).

Moreover, Butch Johnson, the head investment officer at the Fund with whom Mr. Stangl dealt, testified that the Fund treated this transaction as an equity investment and even carried this transaction on its books as an equity. Mr. Johnson testified by proffer:

Q. Okay. And if you know, how was the [1983] transaction communicated to [Attorney Brent] Stevenson?

. . .

[A.] Basically Mr. Stangl, myself, and Brent Stevenson sat down in my office, went through the provisions that had been

negotiated, and outlined a format that could accomplish all of the things that I've mentioned to convert this from a participating loan to a partnership with just a loan against the partnership.

Q. Okay. And was that ultimately accomplished, that conversion?

A. Yes. Mr. Stevenson prepared the documents and they were signed.

Q. Subsequently to that point, Mr. Johnson, if you know, how did the--how did the State Retirement Fund carry the Creekview property on their books? Was it treated as a loan or equity or both or do you know?

A. It was treated as an equity.

(Trial transcript of January 30, 1991 (emphasis added)).

William Chipman, Butch Johnson's successor at the Fund, was also questioned at trial about the Fund's characterization of the transaction between the parties. The court sustained an objection to the question, stating:

> Objection sustained. I do that on the ground what his category or even what The Fund's category of treatment as far as their internal operation is concerned does not change the legal obligations on the parties as reflected by the documents they executed. You could call it anything you want and it still wouldn't change the legal obligation. So that's the reason that the Court is sustaining the objection.

Trial transcript of January 31, 1991 at 236-37.

Based on the foregoing authorities, the court's ruling on the objection was plain error.

Mr. Chipman testified at his deposition, however:

Q. . . . How were these participating loans carried on the books of the Utah State Retirement Fund? How were they booked?

A. I think it was all in a general ledger, real estate. I think each transaction had a number that was assigned to it. A property number. And my recollection is all the so-called participate or convertible -- they're all structured a little differently. No two are exactly alike. Had a number sequence that was different from the all cash purchases. But they were all shown under the same accounting data. We did have some subsidiary ledgers or subsidiary breakout where we showed the participating mortgages separate from the all cash purchases.

. . .

Q. Do you recall how the annual audit reports reflected these assets? Were they separately broken out? Real estate equities and real estate loans or was it just real estate assets and a number out to the side?

A. Well, I think in the -- main report, the annual report, the auditors prepare just real estate, one category. We might have had a different report, a subsidiary ledger we

prepared on a separate page that broke it out into land, office buildings, shopping centers, industrial properties.

Q. I see.

A. And there may even have been a participating mortgage section. And it varied from year to year how that was represented.

. . .

Q. You heard Mr. Johnson testify that he considered these participating mortgages to be equities because the Fund had greater than 50 percent position. Did you share that conclusion?

A. Yes, I think I shared that with -- with him.

(Deposition of William Chipman (February 21, 1989) at 21-24.)

Because the parties' actions have demonstrated an intent different from that expressed in the written agreements, their actions have created an ambiguity. Accordingly, the trial court erred by not allowing parol evidence as to the parties' true intent.

B. Parol evidence should be admitted when there is a latent ambiguity.

The trial court erred in not allowing parol evidence to show the parties' intent because a latent ambiguity exists. When a latent ambiguity exists, the trial court should allow extrinsic evidence to resolve any ambiguity. Hamada v. Valley National Bank, 555 P.2d 1121, 1123 (Ariz. Ct. App. 1976). In Hamada, a

third party obtained a series of loans from the plaintiff for approximately $45,000, for which the third party pledged stock to secure the loan. Because the stock was in an obscure and small company, the plaintiff required the defendant, who was a partner of the third party, to agree to purchase the stock at a set price upon demand by the plaintiff as security for the loan. The agreement clearly provided for a purchase of the shares upon demand at a set price. After the third party defaulted on the loan, the plaintiff demanded that the defendant purchase the stock as required by the agreement. The court found that the extrinsic evidence raised a question of whether the agreement was intended by the parties to be an unconditional agreement to purchase the stock or whether it was a guarantee. If the agreement were a guarantee, then it would not have been enforceable since subsequent loans were made. The court stated that

> [a] latent ambiguity is one where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for an interpretation or a choice among two or more possible meanings. Since the detection of the latent ambiguity requires a consideration of facts outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist.

Id. at 1123.

The Oregon Court of Appeals in Rodway v. Arrow Light Truck Parts, Inc., 772 P.2d 1349 (Or. Ct. App. 1989), similarly held

that extrinsic evidence should be allowed to show that there are latent ambiguities. The defendant and the third party defendant in Rodway entered into an agreement to indemnify the defendant from any personal liability "due to his status or activity as an officer, director or shareholder of Arrow Light Truck Parts, Inc." Id. at 1351. In return for the indemnification agreement, the defendant sold his stock in Arrow to the third party defendant for a very reduced price. The plaintiff subsequently brought an action for damages pursuant to a lease which the defendant signed prior to becoming an officer of Arrow, but after the date of formation of the corporation. The defendant asserted that the indemnification agreement protected him from liability based on the breach of this lease because the clear intent of the parties was to indemnify him from any liability in relation to his association with Arrow.

The court stated that

> [i]n this case, the plain meaning of the term 'officer' and 'director' could be interpreted to exclude activities undertaken before [the defendant's] formal election, but the application of the indemnity clause to [the defendant's] act of signing the lease creates a latent or extrinsic ambiguity as to whether the indemnity clause covers agreements signed in furtherance of the existing corporation by persons about to become officers and directors of that corporation.

Id. at 1351-52. Noting that a contract with unambiguous terms is generally construed according to the plain meaning of those terms, the court further stated that "extrinsic evidence may be

used to show that there are latent ambiguities." Id. at 1351. See also Pistone v. Superior Court, 279 Cal. Rptr. 173, 177 (1991) ("no matter how clear and unambiguous a writing is on its face, the rule allows admitting evidence to resolve a latent ambiguity").

In the present case, a latent ambiguity exists in the combination of the partnership agreement and the loan documents and the substantial difference in capital contributions and percentages of ownership. Under the Fund's argument, when the parties entered the partnership agreement, Mr. Stangl contributed the real property, which contribution the partners valued at $500,000, and received a 20% interest in the partnership. The Fund made a contribution of the loan of $4,350,000, which the partners valued at $100, and received an 80% interest in the partnership. As Mr. Stangl testified at trial, it simply did not make sense that he would contribute $500,000 to a partnership for a 20% interest, and assume personal responsibility for a $4,350,000 loan. At the same time, the Fund contributed $100 for an 80% interest in the partnership and assumed no risk with respect to the loan. This construction of the agreements would produce an absurd result. See Cashio v. Shoriak, 481 So. 2d 1013, 1016 (La. 1986) ("If a literal interpretation will lead to absurd consequences, then the court can go beyond the forced meaning and consider all pertinent facts."). If Mr. Stangl wanted to enter into a simple "loan" arrangement, he could have

done so without giving away property worth $500,000. At the very least, this creates a latent ambiguity as to the meaning of the documents. Accordingly, the lower court should have allowed extrinsic evidence in order to explain the parties' true intent.

The trial court erred by refusing to consider extrinsic evidence in determining the intent of the parties because the parties' actions created an ambiguity. Up until the time the partnership began to lose money, both parties treated the transaction as an equity investment. Only when the Fund realized that its investment was not going to be fruitful did it assert that this transaction was only a loan. (Testimony of Stangl, Trial Transcript of January 30, 1991, at 88.)

There is evidence that the parties intended the loans themselves to be the capital contribution of the Fund. The Fund contends that its capital contribution was valued at $100 and was its willingness to make the loans. Stangl obviously believed differently as set forth in his testimony quoted in Point I.A. Even William Chipman, however, testified as follows:

> Q. [by Mr. Marshall] My question is: Did the Retirement Fund and the limited partnership--excuse me. Strike that. Did the Retirement Fund and Price K.M. ever enter into an agreement in writing for an additional contribution from the Retirement Fund?
>
> A. Yes. There was a second letter of financing that was additional capital.

Q. I'm talking about not the second loan in 1985; I'm talking about additional capital contribution in the partnership over the one hundred--

MR. HUNT: Well, objection. Counsel is testifying, your honor.

THE COURT: Well, the objection is overruled. Obviously, the witness is confusing loan funds with capital contribution. So that needs to be clarified for him.

Trial Transcript of January 30, 1991 at 232-33.

Chipman obviously viewed the loan proceeds as a capital contribution which supports Stangl's contention that the loan was treated by both Stangl and the Fund as an equity investment and not as a loan.

Because of this latent ambiguity, the court was in error in refusing to consider extrinsic evidence.

II.

THE TRIAL COURT ERRED IN REFUSING TESTIMONY REGARDING THE LEGALITY OF THE LOAN AGREEMENT.

The trial court erred in not allowing testimony on whether the loan agreement constituted an ultra vires act because the appellants had a right to defend against the appellee's claims on the grounds that the appellee's actions were ultra vires. The doctrine of ultra vires provides that any action beyond the scope of an entity's authority is null and void. Weese v. Davis County Comm'n, 834 P.2d 1 (Utah 1992). In Weese, this Court considered

whether a contract existed between Davis County and its employees with respect to merit increases in pay for following years. This Court held that because Article XIV, section 3, of the Utah Constitution prohibited a governmental entity from creating or incurring any debt in excess of tax revenues for the current year, the county commission could not bind itself for debts incurred in subsequent years. Because the contract at issue consisted of incurring debt in future years, the county did not have the right to enter the agreement. In holding the contract to be null and void, the Court stated that "[a]ny act by the county in excess of this authority or forbidden by the Utah Constitution is null and void as an ultra vires act." Id. at 3.

In First Equity Corp. v. Utah State Univ., 544 P.2d 887 (Utah 1975), this Court also stated that a state institution is subject to the control of the legislature and the laws of this state and that "a power not granted is a power prohibited." Id. at 891. In First Equity, the plaintiff brought an action against Utah State University to collect commissions on the purchase of common stock. Although the legislature granted Utah State University the authority to handle its financial affairs, the Court found that this grant of authority did not include the authority to invest in common stock. Consequently, the contract between the plaintiff and Utah State University was an ultra vires act and was declared by the court to be null and void. The Court stated that "'[w]here a statute confers certain specific

powers, those not enumerated are withheld. In other words, enumeration of powers operates to exclude such as are not enumerated.'" Id. (emphasis in original) (quoting Van Eaton v. Town of Sydney, 231 N.W. 475, 477 (Iowa 1930)).

In this case, Utah Code Ann. § 49-9-12(h) (1981) provided that the Fund could invest only in real estate mortgages which were secured by the Federal Housing Administration or Veterans Administration insurance or guaranteed by a corporation approved by the state commissioner of insurance. Utah Code Ann. § 49-9-12(h) (1981) (repealed in 1987). Although in 1983 the legislature amended section 49-9-12 to allow the Fund to make any investment in which a prudent man dealing with the property of another would invest, this amendment was not effective at the time the 1983 transaction occurred. It, therefore, cannot apply.[2] Furthermore, even if it were to apply, the specific enumeration of authority to invest in certain types of real estate loans would preclude the Fund from investing in all other types. Where there is both a general provision and a specific provision, the specific provision will govern. See Pan Energy v. Martin, 813 P.2d 1142, 1145 (Utah 1991). Thus, the 1985 loan is not saved by the 1983 amendment to section 49-9-12.

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[2] The Fund's ratification argument is really an argument for retroactive application of a statute. Unless a statute is expressly stated to apply retroactively, it can only be applied prospectively. Washington National Insurance Co. v. Sherwood Associates, 795 P.2d 665, 667 (Utah Ct. App. 1990).

There is no other statute or grant of authority to the Fund which would have allowed it to invest in any other real estate mortgages. The legislature's enumeration of certain types of real estate loans in which the Fund could invest, operated to specifically exclude the authority to invest in any other types of loans. The "loan" to the partnership in this case was not secured by FHA or VA insurance and was not guaranteed by a corporation approved by the state commissioner of insurance. Any act by the Fund to make a "loan" of this type would be an ultra vires act and null and void.

In addition, the doctrine of estoppel cannot give legal effect to an ultra vires act. In Town of Gila Bend v. Walled Lake Door Co., 490 P.2d 551 (Ariz. 1971), the Arizona Supreme Court stated that the doctrine of estoppel could not prevent a person from asserting the defense of ultra vires. Although the act complained of in Town of Gila was not ultra vires, the court stated that

> [i]n a proper case, the principles of waiver and estoppel cannot be applied to circumvent stated legislative intent and policy, nor can a contract which violates [a statute] and is, therefore, void ab initio be ratified or approved in any manner by defendant or its officers or any other persons so as to create an enforceable liability.

Id. at 558 (emphasis in original).

In the present case, the legislature expressed a clear intent that it did not want the Fund to invest in real estate loans that were not secured by Federal Housing Administration or

Veterans Administration insurance or guaranteed by a corporation approved by the State Commissioner of Insurance to guarantee loans. Utah Code Ann. § 49-9-12(h) (1981). Although the trial court may have disagreed with the reasons behind the legislature's actions, the court cannot replace the legislature's judgment with its own. Private individuals and state agencies also cannot circumvent legislative dictates. By not allowing the appellants to introduce evidence on their ultra vires defense because they accepted the benefits of the contract, the trial court allowed the Fund to accomplish indirectly what it could not do directly. The trial court enforced an illegal contract.

Moreover, because the Fund did not have the legal authority to make the kind of loan that was made in this case, construing the transaction as a loan denied giving legal effect to the transaction. "This court has long adhered to the principle that in construing a contract, the construction giving an instrument a legal effect to accomplish its purpose will be adopted where reasonable, and between two possible constructions that will be adopted which establishes a valid contract." Stangl v. Todd, 554 P.2d 1316, 1319-20 (Utah 1976). See also Frailey v. McGarry, 211 P.2d 840, 847 (Utah 1949) (if contract can be declared lawful by any reasonable construction, it is court's duty to so interpret it). The trial court erred by not allowing extrinsic evidence on whether the documents constituted a "loan," or as Stangl contends, an equity investment. This construction effectively gave

the documents no legal effect. To give the documents legal effect, the trial court should have allowed extrinsic evidence to show the parties' true intent and should have construed the documents as providing for an equity investment. This was authorized by Utah Code Ann. § 49-9-12(m) (1981) (repealed in 1987) and is in accordance with the actions of both parties.

III.

THE TRIAL COURT ERRED BY ALLOWING COMPOUND INTEREST.

The trial court erred by allowing compound interest because the loan agreements did not explicitly provide for compound interest. In Mountain States Broadcasting Co. v. Neale, 776 P.2d 643 (Utah Ct. App. 1989), the court did not allow compound interest because "the parties [did not] expressly agree[] to compound interest . . . ." Id. at 647 (emphasis added). In Mountain States, the interest provision stated that "'[t]his Note shall bear interest upon the unpaid principal balance hereof from the date hereof until paid, at a rate of ten percent (10%) per annum. Should interest not be paid when due, it shall thereafter bear like interest as the principal.'" Id. (quoting loan provision). As noted by the court, this provision only provided that unpaid interest would bear interest the same as the principal. There was no provision which explicitly provided that interest should be compounded monthly and the court, therefore, did not allow it. The court based its holding on the fact that "[i]n Utah, compound interest is not favored by the law." Id.

In the present case, the interest provisions in the loan agreements also do not expressly provide for interest to be compounded monthly. The provisions state that "[i]n the event the holder hereof exercises its right to accelerate hereunder, the entire unpaid principal balance, together with all accrued but unpaid interest, shall thereafter, until paid, and both before and after judgment, earn interest at the rate of eighteen percent (18%) per annum." There is nothing in this provision which expressly provides for interest to be compounded monthly. All that the provision allows is that upon acceleration, accrued but unpaid interest will be added to the principal and both will earn simple interest at the specified rate. Because the interest provision did not explicitly provide for interest to be compounded monthly, the trial court erred in awarding compound interest.

IV.

THE TRIAL COURT ERRED IN ENTERING DUPLICATIVE JUDGMENTS.

The Partial Summary Judgment and Order and Decree of Foreclosure included judgment against Franz C. Stangl, III, individually and as personal representative of the Estate of Elizabeth Ann Stangl, on Plaintiff's Third Claim for Relief for the amounts of $5,052,383.47 and $247,302.38. These amounts were to bear interest at the rate of 18% per annum, compounded monthly, until paid. In addition, the Fund was awarded interest on the combined total late charges in the amount of $2,202.50 at the rate of 12% per annum until paid. See Partial Summary Judgment and Order and

Decree of Foreclosure, Exhibit A to the Addendum hereto, at ¶ 3 (hereinafter "Summary Judgment").

The Summary Judgment further provided that any amounts recovered by the Fund through the foreclosure sale of the subject property would be credited against the judgment against Stangl, individually and in his capacity as personal representative of Elizabeth Ann Stangl's estate. See id. at ¶ 5.

Following the entry of the Summary Judgment, the subject property was sold for $3,500,000. Post trial, the lower court awarded the Fund a deficiency judgment against Priceview, Ltd., Franz C. Stangl, III, and Price K.M. in the amounts of (1) $2,481,314.16, with interest accruing on $2,479,260.90 at the rate of 18% per annum from April 1, 1991, compounded monthly, and interest accruing on $1,683.00 at the rate of 12% per annum from April 1, 1991, and (2) $342,265.96 with interest accruing on $340,063.46 at the rate of 18% per annum from April 1, 1991, compounded monthly, and interest accruing on $2,202.50 at the rate of 12% per annum from January 31, 1990. See Judgment, Exhibit B to Addendum hereto, at ¶¶ 1, 2.

The Judgment also provided that the liability of Stangl, Priceview and Price K.M. was joint and several with the liability of Stangl under the Summary Judgment. "Satisfaction of one such liability shall constitute satisfaction of the other." Id. at ¶ 3. Despite the foregoing language providing that satisfaction of the Judgment constituted satisfaction of the Summary Judgment and

vice versa, two judgments for the same liability were entered against Stangl. The Summary Judgment was entered against Stangl as a guarantor and the Judgment was entered against him as a general partner of Price K.M., the general partner of Priceview. Nevertheless, the Fund is entitled to only one recovery and it was improper for the Court to enter duplicative judgments against Stangl individually given the posture of this case. The harm to Stangl is that two judgments exist against him for the same liability, albeit in his different capacities as guarantor and general partner.

It was improper for the court to enter the summary judgment against Stangl as part of the Judgment and Decree of Foreclosure. Utah Code Ann. § 78-37-1 (1992) provides:

> There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of mortgaged property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and a special execution or order of sale shall be issued for that purpose.

(Emphasis added). Section 78-37-2 goes on to provide that

> [i]f it appears from the return of the officer making the sale that the proceeds are insufficient and a balance still remains due, judgment therefor must then be docketed by the clerk and execution may be issued for such balance as in other cases; but no general execution shall issue until after the sale of the mortgaged property and the application of the amount realized as aforesaid.

While it is true that section 78-37-1 does not by its terms apply to guaranties, the Fund chose to combine a cause of action on the guaranty of Stangl and his late wife with its judicial mortgage foreclosure action. It was procedurally incorrect for the court to add a personal judgment against Stangl in the Judgment and Decree of Foreclosure because section 78-37-1 only allows the court to enter a judgment "adjudging the amount due" and ordering the sale of the property. The court should have waited until after the subject property was sold at sheriff's sale to enter a deficiency judgment against Priceview, Price K.M. and Stangl, and a judgment on the guaranty against Stangl. Accordingly, the Summary Judgment should be satisfied, but under no circumstances should there exist two judgments against Stangl (in whatever capacity) for the same liability.

V.

THAT THE TRIAL COURT ERRED IN REFUSING TO RECUSE ITSELF IS EVIDENT FROM THE COURT'S BIAS AGAINST STANGL EXHIBITED AT TRIAL

In the original Brief of Appellant filed March 28, 1991, Appellants fully brief the recusal issue. The Fund complained in its responsive brief, however, that the issue was not properly before this Court. Appellants therefore incorporate its earlier arguments here.

At trial the lower court exhibited a bias against Stangl that went beyond ruling in the Fund's favor. Particularly during Stangl's cross-examination of William Chipman as the Fund's

rebuttal witness, the court displayed inconsistent rulings and an undue irritation with Stangl and his legal theories. Stangl was effectively prevented from cross-examining Mr. Chipman. Chipman's cross-examination was as follows:

> Q. [By Mr. Hunt] Mr. Chipman, calling your attention to Paragraph 4.03 of the partnership agreement, Exhibit P-4, as I read the first sentence in that paragraph, it says that the--"As its initial and only required contribution to the capital of the partnership, the limited partner shall make a loan to the partnership in the principal sum of up to $4,350,000 in accordance with the terms, conditions, and provisions set forth in the promissory note and the subsequent disbursement agreement attached hereto as Exhibits B and C, respectively, and which loan shall be secured by a first and prior trust deed lien upon the property and all improvements thereon and such other collateral related to the property as the limited partner may require."
>
> Is that your understanding of the capital contribution of The Fund to the partnership?
>
> MR. MARSHALL: I object to that. What he understands is not relevant.
>
> THE COURT: Yes. I think it speaks for itself, Counsel. I don't know what he can answer. So the objection is sustained.

MR. HUNT: Well, your Honor, Counsel has just been asking him question after question relating to this document.

THE COURT: But he was asking him questions whether it was altered by other written means. He was asked: "Was there a written statement?" And he said: "No." That's all he asked him there. He didn't ask him to interpret the provisions of it.

Q. (By Mr. Hunt) To your knowledge, did The Fund make its capital contribution to this partnership?

A. Which capital contribution are you referring to?[3]

Q. The ones stated in Paragraph 4.03.

MR. MARSHALL: Well, I have to object to that question because--

MR. HUNT: It's a question of fact, your Honor. I'm asking if they made the capital--

MR. MARSHALL: I object. It's not an issue in this case that's ever been raised before.

---

[3] As set forth in Point I.B. above, this question was significant. Chipman had testified on direct examination as a rebuttal witness that "[t]here was a second letter of financing that was additional capital." (Trial Transcript of January 30, 1991, at 233). The court noted that the witness was "confusing loan funds with capital contribution." Id. That is exactly the point. Stangl maintains that the parties considered the loan funds to be an equity investment with the risk of loss to be borne by both parties. Hence, the provision in the partnership agreement allowing Stangl's distribution in kind of partnership assets to the limited partner if "things went to hell in a handbasket." (Testimony of Stangl, Trial Transcript of January 30, 1991, at 77).

THE COURT: It's really not an issue.

THE WITNESS: Yes, they did. They loaned them the money. They paid the $100. At least nobody has ever denied it.

Q. (By Mr. Hunt) The $100 was the agreed value?

THE COURT: Well, whatever it says. Anyway, the loan was made so-- Go ahead. Put your next question.

Q. (By Mr. Hunt) Mr. Chipman, you agree with Mr. Johnson that this property was treated as an equity by The Fund; isn't that correct?

MR. MARSHALL: Well, I object again. Irrelevant and immaterial. Parol evidence.

THE COURT: Objection sustained. I do that on the ground what his category or even what the Fund's category of treatment as far as their internal operation is concerned does not change the legal obligations on the parties as reflected by the documents they executed. You could call it anything you want and it still wouldn't change the legal obligation. So that's the reason that the Court is sustaining the objection.

Q. (By Mr. Hunt) Mr. Chipman, you agree that The Fund periodically--in fact, The Fund had a policy that it would from time to time actually sell the property or sell one of its equities at an amount that constituted a loss to The

Fund, if that was considered in the long-term best interest of the Fund; isn't that correct?

MR. MARSHALL: Objection, irrelevant and immaterial.

THE COURT: Yes. That's irrelevant, Counsel, what they would do on another transaction. I can't see where that's material. So objection is sustained.

MR. HUNT: I have no further questions, your Honor.

(Trial transcript of January 30, 1991 at 234-37 (emphasis added)).

As set forth in Point I of this brief, the parties' conduct with respect to the loan transaction was indeed relevant and established an ambiguity in the transaction. The court not only erred in refusing to hear or consider testimony concerning the way the Fund characterized the loan, the court displayed an undue intolerance of Stangl and his position. Harboring such strong feelings and an apparent inability to impartially consider Stangl's case, the court should have recused itself.

CONCLUSION

Based on the arguments contained in this Brief, the original Brief of Appellant and Reply Brief of Appellant filed March 28, 1991, and June 17, 1991, respectively, Defendants respectfully request this Court to reverse and remand with the following instructions to the trial court: (1) allow and consider evidence of the parties' intent in entering the partnership agreement and loan documents; (2) allow and consider evidence and law

concerning the legality of the loan; (3) change the interest on any judgment to simple interest; (4) order the entry of a satisfaction of the summary judgment so that there are not duplicate judgments against Stangl; and (5) order Judge Bunnell to recuse himself from further trial or pre-trial proceedings.

RESPECTFULLY SUBMITTED this 28th day of October, 1992.

CAMPBELL MAACK & SESSIONS

CLARK W. SESSIONS
CYNTHIA K.C. MEYER

CERTIFICATE OF SERVICE

On this 28th day of October, 1992, I hereby caused to be hand-delivered, four true and correct copies of the foregoing **Supplemental Brief of Appellants** to the following:

R. Stephen Marshall, Esq.
VAN COTT, BAGLEY, CORNWALL & McCARTHY
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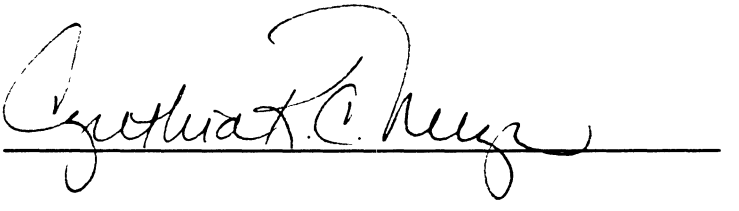
Attorneys for Plaintiff/Respondent



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IN THE SUPREME COURT

STATE OF UTAH

UTAH STATE RETIREMENT BOARD, as trustee of UTAH STATE RETIREMENT FUND, a common trust fund, Plaintiff/Appellee, v. PRICEVIEW, LTD., a Utah limited partnership; PRICE K.M., a Utah limited partnership; FRANZ C. STANGL, III, individually and as Personal Representative of the Estate of ELIZABETH ANN STANGL; and JOHN DOES 1 THROUGH 20, Defendants/Appellants.	:	Case No. 900302

ADDENDUM TO SUPPLEMENTAL BRIEF OF APPELLANTS

EXHIBIT A	-	PARTIAL SUMMARY JUDGMENT AND ORDER AND DECREE OF FORECLOSURE
EXHIBIT B	-	JUDGMENT
EXHIBIT C	-	FINDINGS OF FACT AND CONCLUSIONS OF LAW
EXHIBIT D	-	MEMORANDUM DECISION ON TRIAL MATTERS
EXHIBIT E	-	UTAH CODE ANN. § 49-9-12 (1981 SUPP. 1986)
EXHIBIT F	-	UTAH CODE ANN. § 78-37-1 (1992)

Tab A

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY

STATE OF UTAH

UTAH STATE RETIREMENT BOARD, as trustees of UTAH STATE RETIREMENT FUND, a common trust fund, Plaintiff, vs. PRICEVIEW LTD., a Utah limited partnership; PRICE K.M., a Utah limited partnership; FRANZ C. STANGL, III; ELIZABETH ANN STANGL; and JOHN DOES 1 through 20, Defendants.	PARTIAL SUMMARY JUDGMENT AND ORDER AND DECREE OF FORECLOSURE Civil No. 15620

The Court, having entered its Memorandum Decision on plaintiff's Motion for Summary Judgment, dated October 19, 1989, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendant Priceview Ltd. owes the following amounts to plaintiff on the First Claim for Relief of plaintiff's Amended Complaint:

EXHIBIT NO. A

Principal	$4,204,112.64
Interest through 6/1/89	971,442.58
Late Charges	1,683.00
Interest on late charges through 11/10/89	145.25
Less payment from Receiver	(125,000.00)
TOTAL	$5,052,383.47

Interest shall accrue on the total amount of $5,052,383.47 at the rate of eighteen (18) percent per annum from June 1, 1989, compounded monthly, until paid in full.

2. Defendant Priceview Ltd. owes the following amounts to plaintiff on the Second Claim for Relief of plaintiff's Amended Complaint:

Principal	$159,883.23
Interest through 6/1/89	85,216.65
Late Charges	2,027.52
Interest on late charges through 11/10/89	174.98
TOTAL	$247,302.38

Interest shall accrue on the total combined amount of principal and accrued interest in the amount of $245,099.88 at the rate of eighteen (18) percent per annum from June 1, 1989, compounded monthly, until paid in full. Interest shall accrue on the combined total of late charges and accrued interest thereon in the amount of $2,202.50 at the rate of twelve (12) percent per annum, simple interest, from the date of this Judgment until paid in full.

3. Plaintiff is awarded judgment against defendant Franz C. Stangl, III, individually and as personal representative of the Estate of Elizabeth Ann Stangl, on the Third Claim for Relief of the Amended Complaint, which shall be joint and several with the judgment against Priceview Ltd., for the following amounts:

A. On the First Note dated February 28, 1983:

Principal	$4,204,112.64
Interest through 6/1/89	971,442.58
Late Charges	1,683.00
Interest on late charges through 11/10/89	145.25
Less payment from Receiver	(125,000.00)
TOTAL	$5,052,383.47

Plaintiff is entitled to interest on the total judgment amount of $5,052,383.47 at the rate of eighteen (18) percent per annum from June 1, 1989, compounded monthly, until paid in full.

B. On the Second Note dated March 12, 1985:

Principal	$159,883.23
Interest through 6/1/89	85,216.65
Late Charges	2,027.52
Interest on late charges through 11/10/89	174.98
TOTAL	$247,302.38

Plaintiff is entitled to interest on the total combined amount of principal and accrued interest in the amount of $245,099.88 at the rate of eighteen (18) percent per annum from June 1, 1989, compounded monthly, until paid in full. Plaintiff is

further entitled to interest on the combined total of late charges and accrued interest thereon in the amount of $2,202.50 at the rate of twelve (12) percent per annum from the date of this Judgment until paid in full.

4. Determination of the amount of plaintiff's reasonable attorneys' fees is reserved and shall be determined at an evidentiary hearing at which plaintiff shall have the burden of establishing the amount of its reasonable attorneys' fees.

5. Any amounts received by plaintiff through the foreclosure sale of the subject real property shall be credited toward the Judgment against Franz C. Stangl, III, individually and as personal representative of the Estate of Elizabeth Ann Stangl.

6. The property described in the First Deed of Trust dated February 28, 1983, and Second Deed of Trust dated March 12, 1985, and hereinafter more particularly described, or such portions thereof as may be sufficient to pay the amounts found to be due and owing under this Judgment, and the accruing costs herein, and expenses of sale, shall be sold at public auction by the sheriff of Carbon County, State of Utah, in the manner prescribed by law for such sales. The Sheriff, out of the proceeds of such sale shall retain first his costs, disbursements, and commissions, and then shall pay to

plaintiff, or to its attorneys, the accrued and accruing costs of this action, then such sums for plaintiff's attorneys' fees, then the amount owing to plaintiff for principal, interest, costs, and expenses, or so much of such sums as such proceeds will pay, and the surplus, if any, shall be accounted for and paid over the the Clerk of this Court subject to this Court's further order.

7. All persons having an interest in the subject premises shall have the right, upon producing satisfactory proof of interest, to redeem the same within the time provided by law for such redemption. From and after the expiration of the period of redemption, as provided by law, all defendants and each of them, and all persons claiming by, through, or under them, and any other person or entity shall be forever barred and foreclosed of all right, title, interest, and estate in and to the subject premises and from and after the delivery of the Sheriff's Deed to the subject premises the grantee named therein shall be given possession thereof.

8. The issue whether any of defendants shall be liable for any deficiency judgment following the foreclosure sale of the subject property is reserved pending trial of the issue whether or not plaintiff's actions impaired the value of the subject property sufficiently to relieve defendants from responsibility for payment of a deficiency judgment.

9. The subject real property described in the First and Second Deeds of Trust is located in Carbon County, State of Utah, and is more particularly described as follows:

> Beginning at a point on the South line of a highway right-of-way and the West line of a street, said point being North 827.95 feet and West 1677.63 feet from the Northeast corner of Sunset View Subdivision, said Northeast corner of Sunset View Subdivision said to be South 945.23 feet and West 339.30 feet from the Northeast corner of Section 20, Township 14 South, Range 10 East, Salt Lake Base and Meridian, running thence South 89°26'13" West 502.17 feet along the South line of said highway; thence South 9°38'59" East 446.94 feet; thence Southeasterly 510.12 feet along the arc of a 636.197 foot radius curve to the left (long chord bears South 32°37'14" East 496.57 feet); thence South 55°35'29" East 91.37 feet; thence North 14°48'42" West 61.24 feet; thence North 55°35'29" West 45.00 feet; thence Northwesterly 5.00 feet along the arc of a 596.197 foot radius curve to the right (long chord bears North 55°21'05" West 5.00 feet); thence East 444.13 feet; thence North 429.092 feet; thence Northwesterly 533.19 feet along the arc of a 413 foot radius curve to the right (long chord bears North 37°34'27" West 496.925 feet); thence North 0°35'21" West 5.02 feet to the point of beginning.

10. Plaintiff is entitled to its post-judgment costs and a reasonable attorneys' fee, as shall be shown by affidavit of plaintiff or its counsel.

11. Defendant Priceview Ltd. was terminated and dissolved June 7, 1988.

DATED this 31ST day of January, 1990.

BY THE COURT:

Boyd Bunnell
District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing Partial Summary Judgment to be hand delivered this 18th day of January, 1990, to the following:

George A. Hunt
Kurt M. Frankenburg
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, Utah 84145

R S Marshall

9644m
011890

Tab B

JUN 13 1991

BY _____ DEPUTY

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY

STATE OF UTAH

UTAH STATE RETIREMENT BOARD, as trustees of UTAH STATE RETIREMENT FUND, a common Trust fund, Plaintiff, vs. PRICEVIEW LTD., a Utah limited partnership; PRICE K.M., a Utah limited partnership; FRANZ C. STANGL, III; ELIZABETH ANN STANGL; and JOHN DOES 1 through 20, Defendants.	JUDGMENT Civil No. 15620

The Court having entered its Findings of Fact and Conclusions of Law in the above-captioned action, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Utah State Retirement Board is awarded judgment against defendants Priceview Ltd., Price K.M., and Franz C. Stangl, III, jointly and severally, as follows:

1. Plaintiff is awarded judgment against defendant Priceview Ltd.:

EXHIBIT NO. B

(a) On the First Claim for Relief of plaintiff's Amended Complaint for the following amounts:

Principal		$4,204,112.64
Interest through 4/1/91		2,163,548.26
Late charges		1,683.00
Interest on late charges through 4/1/91		370.26
Less payments from Receiver:		
10-24-89	(125,000.00)	
1-22-90	(60,000.00)	
3-12-90	(203,400.00)	(388,400.00)
Less proceeds of Sheriff's sale		(3,500,00.00)
TOTAL		$2,481,314.16

Interest shall accrue on the total amount of $2,479,260.90 at the rate of eighteen percent (18%) per annum from April 1, 1991, compounded monthly, until paid in full. Interest shall accrue on the late charge in the amount of $1,683.00 at the rate of twelve percent (12%) per annum, simple interest, from April 1, 1991, until paid in full.

(b) On the Second Claim for Relief of plaintiff's Amended Complaint for the following amounts:

Principal	$159,883.23
Interest through 4/1/91	180,180.23
Late charges	2,027.52
Interest on late charges as per Judgment of 1-31-90	174.98
TOTAL	$342,265.96

Interest shall accrue on the total combined amount of principal and accrued interest in the amount of $340,063.46 at the rate of eighteen percent (18%) per annum from April 1, 1991, compounded monthly, until paid in full. Interest shall accrue on the combined total of late charges and accrued interest thereon in the amount of $2,202.50 at the rate of twelve percent (12%) per annum, simple interest, from January 31, 1990, (the date of the prior judgment) until paid in full.

(c) On the Fifth Claim for Relief of plaintiff's Amended Complaint for the following amounts:

Principal	$33,926.00
Accrued interest through 4/1/91	23,756.78
TOTAL	$57,682.78

Interest shall accrue on the total combined amount of principal and accrued interest of $57,682.78 from the date of this Judgment at the rate of twelve

percent (12%) per annum, simple interest, until paid in full.

2. Plaintiff is awarded Judgment against defendants Franz C. Stangl, III, and Price K.M., jointly and severally, on the Eighth Claim for Relief of plaintiff's Amended Complaint for the amounts set forth in Paragraph 1, above, including the amounts awarded under the First, Second, and Fifth Claims for Relief.

3. The liability of defendants Franz C. Stangl, III, Priceview Ltd., and Price K.M. for the judgment amounts on the First and Second Claims for Relief of plaintiff's Amended Complaint, as set forth above in Paragraphs 1(a) and (b), is joint and several with the liability of defendant Franz C. Stangl, III, under the Partial Summary Judgment and Order and Decree of Foreclosure, filed January 31, 1990. Satisfaction of one such liability shall constitute satisfaction of the other.

4. Judgment is awarded against defendants Priceview Ltd., Price K.M., and Franz C. Stangl, III, jointly and severally, for plaintiff's attorneys' fees in the amount of $88,129.60 and costs in the amount of $572.40.

5. IT IS FURTHER ORDERED THAT THIS JUDGMENT SHALL BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEYS' FEES EXPENDED IN COLLECTING SAID JUDGMENT BY EXECUTION OR OTHERWISE AS SHALL BE ESTABLISHED BY AFFIDAVIT.

DATED this 13 day of June, 1991.

BY THE COURT:

Boyd Bunnell
District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing Judgment to be hand-delivered this 17 day of April, 1991, to the following:

George A. Hunt
Williams & Hunt
257 East 2nd South, Suite 500
P.O. Box 45678

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Tab C

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY

STATE OF UTAH

UTAH STATE RETIREMENT BOARD, as trustees of UTAH STATE RETIREMENT FUND, a common Trust fund, Plaintiff, vs. PRICEVIEW LTD., a Utah limited partnership; PRICE K.M., a Utah limited partnership; FRANZ C. STANGL, III; ELIZABETH ANN STANGL; and JOHN DOES 1 through 20, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 15620

The above-captioned action came on for trial before the Honorable Boyd Bunnell, of the above-entitled Court, on January 30, 1991. The Court previously entered Memorandum Decision on Plaintiff's Motion for Summary Judgment, filed October 19, 1989. On January 31, 1990, the Court entered its Partial Summary Judgment and Order and Decree of Foreclosure. At the trial of this action, plaintiff was represented by R. Stephen Marshall, of the law firm of Van Cott, Bagley, Cornwall & McCarthy. Defendants were represented by George A. Hunt and Kurt M. Frankenburg, of the law firm of Snow, Christensen &

EXHIBIT NO C

Martineau. The parties called witnesses and introduced exhibits. Following the trial the parties each submitted post-trial memoranda. Having considered its previous rulings together with the evidence presented at trial and the arguments of counsel, and good cause appearing, the Court does hereby enter its Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

1. Pursuant to the Court's Partial Summary Judgment and Order and Decree of Foreclosure, filed January 31, 1990, the subject property was sold by the Sheriff of Carbon County at a public auction on March 12, 1990, for the sum of $3,500,000.00. Plaintiff also received from the receiver the sum of $60,000.00 on January 22, 1990, and the sum of $203,400.00 as of March 12, 1990, which were applied against the Partial Summary Judgment and Order and Decree of Foreclosure.

2. Plaintiff and defendant entered into a Limited Partnership Agreement (Exhibit P-4), under which defendant Price K.M. was the sole general partner and plaintiff was the sole limited partner. Paragraph 7 of the Limited Partnership Agreement between plaintiff and defendant Priceview Ltd. provided that plaintiff was to receive a percentage of the net cash receipts.

3. Priceview Ltd. failed to pay to plaintiff the sum of $24,767.00 due under that provision of the Limited

Partnership Agreement for the year 1983, and the sum of $9,159.00 due for the year 1984.

4. Defendant Stangl, on behalf of Priceview Ltd., admitted at trial that the payments due under the Limited Partnership Agreement were not made, but contended that the money was used for the mutual benefit of the partnership. This fact would not relieve the partnership from the contractual obligations as stated in the Limited Partnership Agreement.

5. At all relevant times, defendant Price K.M., a Utah limited partnership, was the sole general partner of Priceview Ltd.

6. At all relevant times, defendant Franz C. Stangl III, was the sole general partner of Price K.M.

7. Defendants contended that plaintiff breached its duty of care as a lender and interfered with their operation of the shopping center to the extent that defendants were unable t properly manage the property, and that this prevented them from making the payments on the promissory notes and further prevented them from disposing the property in order to pay off the notes in full.

8. Defendants failed to introduce any evidence to substantiate these claims. No evidence was presented to show that the actions of the plaintiff in any way impaired the valu of the pledged property, diminished the income, or prevented t

leasing or negotiation for leases on any of the pledged property.

9. Much of defendants' case centered on plaintiff's alleged failure to cooperate in the sale of the shopping center together with other property in which the plaintiff had a legal interest. Defendants failed to meet their burden of proving that plaintiff breached any duty to defendants to cooperate wit defendants in their efforts to sell the shopping center.

10. The Court finds that plaintiff's counsel performed legal services as described in the testimony of plaintiff's counsel and in plaintiff's legal bills. (Exhibit P 3.) The Court finds that all of the work performed by plaintiff's counsel was reasonably necessary to adequately prosecute the matter. The Court finds that the billing rates charged by plaintiff's counsel were consistent with the rates customarily charged in the locality for similar services.

11. Based on the evidence presented, the Court finds that plaintiff's reasonable attorneys' fee for legal services rendered by its counsel in this action through the trial is $88,129.60. The Court finds that this fee is reasonable under the circumstances of this case. Although defendants questioned the reasonableness of some of the charges made by plaintiff, defendants presented no affirmative evidence to dispute plaintiff's evidence.

CONCLUSIONS OF LAW

1. This Court has personal and subject matter jurisdiction.

2. Plaintiff is entitled to judgment against Priceview Ltd. on the Fifth Claim for Relief of plaintiff's Amended Complaint for breach of the Limited Partnership Agreement in the total amount of $33,926.00, together with interest thereon at the rate of ten percent per annum in the total amount of $23,794.00 as of April 1, 1991.

3. The fact that the net cash receipts may have bee: used for the benefit of Priceview Ltd. does not relieve the partnership from its obligation to pay such sums to plaintiff pursuant to Paragraph 7 of the Limited Partnership Agreement.

4. Plaintiff is entitled to a deficiency judgment against defendant Priceview Ltd. on the First and Second Claims for Relief of plaintiff's Amended Complaint in the amounts previously found to be due and owing by the Court in the Partial Summary Judgment and Order and Decree of Foreclosure, filed January 31, 1990, less the amount for which the subject property was sold at the Sheriff's sale of March 12, 1990, and the amounts paid to plaintiff by the receiver.

5. Defendant Priceview Ltd. is liable to plaintiff for plaintiff's attorneys' fees in the amount of $88,129.60 and for costs in the amount of $572.40.

6. Defendant Price K.M., as general partner of Priceview Ltd. and defendant Franz C. Stangl, III, as general partner of Price K.M., are jointly and severally liable to plaintiff on the Eighth Claim for Relief of plaintiff's Amended Complaint for all amounts for which Priceview Ltd. is liable to plaintiff, including the amounts described in paragraphs 2, 4, and 5, above, pursuant to the provisions of the Utah Uniform Limited Partnership Act, Utah Code Ann. § 48-2-9 (1989), and the Utah Uniform Partnership Act, Utah Code Ann. § 48-1-12 (1989).

7. Defendants did not meet their burden of proving any of their affirmative defenses.

8. Plaintiff was under no legal duty or obligation to give up its individually held assets, namely the neighboring K-Mart, in order to facilitate defendants' sale of the shopping center. The Court can find no breach of duty on the part of plaintiff to cooperate in defendants' efforts to sell the shopping center.

DATED this _____ day of April, 1991.

BY THE COURT:

Boyd Bunnell
District Judge

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing Findings of Fact and Conclusions of Law to be hand-delivered this 8th day of April, 1991, to the following:

George A. Hunt
Williams & Hunt
257 East 2nd South, Suite 500
P.O. Box 45678

g \wp1\088\00000up8 W51

Tab D

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY
STATE OF UTAH

UTAH STATE RETIREMENT BOARD, as Trustees of UTAH STATE RETIREMENT FUND, a common trust fund, Plaintiff, vs. PRICEVIEW LTD., a Utah limited partnership; PRICE K.M., a Utah limited partnership; FRANZ C. STANGL, III; individually and as Personal Representative of the Estate of ELIZABETH ANN STANGL; and JOHN DOES 1 through 20, Defendants.	MEMORANDUM DECISION ON TRIAL MATTERS Civil No. 15620

This case came on regularly for trial before the Court on January 30, 1991, and the Court heard testimony and received exhibits relative to the issues to be determined by the Court at that time. The Court took the matter under advisement and rules as here and after stated.

The Court has already made findings on the execution of the various documents, the default in the payments as required under those docments, and the establishment of amounts due from defendants to plaintiff, and other related matters. At this trial, one of the issues tried by the Court

EXHIBIT NO. D

was whether Priceview breached the limited partnership agreement and, if so, what amount is owing to the plaintiff as a result of the breach.

The Court finds that the limited partnership agreement between plaintiff and Priceview Ltd. provided that the plaintiff was to receive a percentage of the net cash receipts, and those provisions were covered in Section 7 of the agreement. The Court further finds that Priceview failed to pay to the plaintiff the sum of $24,767.00 due under said provision for the year 1983, and the sum of $9,159.00 for the year 1984.

The defendant Stangl, on behalf of Priceview, admits that the payments were not made but contends that the money was used for the mutual benefit of the Partnership. This fact would not relieve the Partnership from the contractual obligations as stated in the partnership agreement.

The Court has concluded that the plaintiff is entitled to judgment for the amounts due, together with interest at the highest legal rate, against the defendant Priceview in accordance with the executed agreement.

The Court further finds that Price K.M., as a general partnership of Priceview, and F.C. Stangle, III, as a general partner of Price K.M., under the provisions of the Uniform Limited Partnership Act and the provisions of the Uniform Partnership Act, are obligated to pay these amounts to the plaintiff.

The Court therefore authorizes entry of judgment for these amounts in favor of the plaintiff and against these defendants.

A second issue tried by the Court was whether the plaintiff engaged in conduct that impaired the value of the collateral sufficiently to relieve defendants from responsibility for payment of a deficiency judgment.

It is the contention of the defendants that the plaintiff breached its duty of care as a lender, and interfered with their operation of the shopping center to the extent that defendants were unable to properly manage the property, and that this prevented them from making the payments on the promissory notes and further prevented them from disposing of the property in order to pay off the notes in full.

The defendants have failed to introduce any evidence to substantiate this claim. No evidence was presented to show that the actions of the plaintiff in any way impaired the value of the pledged property, or diminished the income, or prevented the leasing or negotiation for leases on any of the pledged property.

Much of the defendant's case centered on plaintiff's failure to cooperate in the sale of the shopping center, together with other property in which the plaintiff had a

legal interest. The plaintiff was under no legal duty or obligation to give up its individually held assets in order to accomplish a sale as proposed by defendants. The Court can find no breach of duty on the part of the plaintiff to cooperate in defendant's efforts to sell the shopping center.

Therefore, the Court concludes that the plaintiff is entitled to a deficiency judgment in accordance with the amounts previously found to be due and owing by the Court. Judgment may be taken for these deficiency amounts against Priceview Limited and Price K.M., and against F.C. Stangl, III, in accordance with partnership law as stated above.

The Court finds that the loan documents and the limited partnership documents both provide for payment of a reasonable attorney's fee to plaintiff upon breach of those agreements by the defendants. The Court further finds that there has been a breach of the defendant's duties under those documents, and that the plaintiffs are entitled to a reasonable attorney's fee and their costs in this proceeding.

The only evidence submitted relative to the amount of a reasonable attorney's fee was presented by plaintiff. The defendants questioned the reasonableness of some of the charges made by the plaintiff, but presented no affirmitive evidence to dispute those contentions.

Based upon the evidence before the Court, which the Court will not herein detail, the Court finds that a reasonable attorney's fee to be awarded to the plaintiff for this action and the foreclosure proceedings is the sum of $88,129.60, and plaintiff is granted judgment against Priceview Ltd., Price K.M., and F. C. Stangl, III, in accordance with Partnership Law. Judgment is further granted for these amounts against F.C. Stangl, III, and against him as personal representative of the estate of Elizabeth Ann Stangl, deceased, based upon their unconditional guarantees.

The attorney for the plaintiff is directed to prepare Findings of Fact, Conclusions of Law and a Decree in accordance with this decision.

DATED this 1ST day of March, 1991.

BOYD BUNNELL, District Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION ON TRIAL MATTERS by depositing the same in the United States Mail, postage prepaid, to the following:

Alan L. Sullivan
R. Stephen Marshall
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Attorneys at Law
50 South Main, Suite 1600
P. O. Box 45340
Salt Lake City UT 84145

George A. Hunt
Kurt M. Frankenburg
SNOW, CHRISTENSEN & MARTINEAU
Attorneys at Law
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City UT 84145

DATED this 1st day of March, 1991.

Secretary

Tab E

UTAH CODE

ANNOTATED

1953

REPLACEMENT

VOLUME 5B

1921 EDITION

EXHIBIT NO. E

49-9-11. Retirement board to control investment of funds — Board to appoint custodian of funds — Fees. The retirement board shall have the control of the investment of any and all funds assigned to the retirement board or retirement office for investment. The board shall determine the method of investing the funds to insure the greatest return commensurate with sound financing adequately safeguarded. The board may invest and reinvest the money in the retirement fund or funds and may provide for the holding, purchasing, selling, assigning, transferring and disposing of any of the securities and investments in which any of the money of the fund or funds is invested. The board shall appoint a custodian for the funds and securities under its control. Fees for such services shall be paid from the interest earnings of the investment fund.

History: L. 1963, ch. 74, § 11; 1965, ch. 86, § 1, 1971, ch. 109, § 3, 1980, ch. 47, § 1.

Compiler's Notes.

The 1965 amendment substituted "investment" for "administration" in two places in the first sentence.

The 1971 amendment substituted "insure" for "ensure" in the second sentence.

The 1980 amendment substituted the last two sentences for a sentence which read: "The state treasurer shall serve without charge as custodian of the fund or funds."

Effective Date.

Section 2 of Laws 1980, ch. 47 provided: "This act shall take effect July 1, 1980."

49-9-12. Investment of funds — Unrated securities — Investments not subject to control of board. (1) The retirement board may invest any and all funds assigned to it as set forth as follows:

(a) Bonds or other evidences of indebtedness of the United States or any of its agencies or instrumentalities when such obligations are guaranteed as to principal and interest by the United States.

(b) General obligation bonds or other evidence of indebtedness of any state, or of any county, incorporated city, town or school district of the state or territory of the United States, provided said bonds are at the time of purchase rated within the three highest classifications established by at least one standard rating service.

(c) Bonds, notes or evidence of indebtedness of any county, municipality, or municipal district utility within the United States, which are payable from revenues or earnings specifically pledged for the payment of the principal and interest on such obligations, provided that said revenue bonds are at the time of purchase rated within the three highest classifications established by at least one standard rating service.

(d) Bonds, debentures or other evidences of indebtedness issued, assumed or guaranteed by any solvent corporation or institution created or existing under the laws of the United States or of any state, district or territory thereof, which are not in default as to principal or interest, provided that said bonds at the time of purchase are rated within the three highest classifications established by at least one standard rating service.

(e) Equipment trust obligations or certificates secured by an interest in transportation equipment wholly or in part within the United States which carry the right to receive determined portions of rental, purchase

or fixed obligatory payments to be made for the use or purchase (or fixed obligatory payments to be made for the use or purchase) of such transportation equipment, provided that said obligations are at the time of purchase rated within the three highest classifications established by at least one standard rating service.

(f) Securities of any open-end or closed-end management type investment company or investment trust, participation in common trust funds or shares, preferred or guaranteed stock, and nonassessable common stock or shares of any solvent corporation or institution created or existing under the laws of the United States or any state, district or territory thereof, provided that said stocks are at the time of purchase rated within the three highest classifications established by at least one standard rating service.

(g) Obligations issued or unconditionally guaranteed by international development lending institutions of which the United States is a member and whose obligations are qualified for investment by national banks.

(h) Real estate mortgages secured by Federal Housing Administration (FHA) or Veterans Administration (VA) insurance or guaranteed commitments or notes secured by mortgages or trust deeds on real estate which are guaranteed as to payment of interest and principal by a corporation, approved by the state commissioner of insurance, which is licensed to do business in the state of Utah as an insurer and which has assets of $50 million or more and that the corporation insurance exposure at the time of note purchase is limited to not more than 25 times the value of capital, surplus and contingency reserves.

(i) Saving deposit or certificate of deposit of a bank insured by the Federal Deposit Insurance Corporation, or to the extent that they are insured in shares or accounts of either state chartered or federal chartered savings and loan and building and loan associations which are insured by the Federal Savings and Loan Insurance Corporation.

(j) The interest in or portion of notes, obligations or other written evidence of indebtedness used as collateral for loans and which are guaranteed by any authorized agency of the United States government as to payment of principal, interest or rents.

(k) Bonds or other evidence of indebtedness issued or guaranteed by an agency or instrumentality of the United States, including, but not limited to, the guaranteed portion of loans guaranteed by any such agency or instrumentality.

(l) Unrated securities which would otherwise qualify for purchase by the board under subsections (1) (b), (c), (d), (e) or (f) of this section, where such unrated securities are found by the board to be of a quality equal to securities rated within the three highest classifications as required of rated securities.

(m) Real estate for the production of income and use not to exceed 15% of the book value of the investment portfolio. Buildings may be purchased

or land acquired and new buildings constructed. At least two certified appraisals are required for purposes of determining portfolio market values.

(2) Investments shall not be subject to the control of the board of examiners.

History: L. 1963, ch. 74, § 12; 1965, ch. 86, § 1; 1973, ch. 98, § 3; 1975, ch. 91, § 3; 1975, ch. 148, § 1; 1979, ch. 172, § 1.

Compiler's Notes.

The 1965 amendment added "or as set forth as follows" to the first sentence; and inserted subds. (a) through (i) and present subd. (l).

The 1973 amendment deleted "in accordance with investments approved for investment of the Utah School Employees' Retirement Funds, or Utah Public Employees' Retirement Funds or" after "assigned to it" in the first sentence; added "or note secured * * * contingency reserves" at the end of subd. (h); inserted subd. (j); and made minor changes in phraseology, punctuation and style.

The 1975 amendment by chapter 91 inserted the subsection designations (1) and (2); deleted "or by any agency or instrumentality thereof, including obligations of the federal land banks, federal intermediate credit banks, federal home owned banks, federal national mortgage associations, farmers home administration notes, and banks for co-operatives" from the end of subd. (1)(a); substituted "international development lending institutions of which the United States is a member and whose obligations are qualified for investment by national banks" in subd. (1)(g) for "International Bank for Reconstruction and Development, or the Inter-American Development Bank"; inserted subd. (1)(k); inserted designation of subd. (1)(l); and made minor changes in phraseology.

The 1975 amendment by chapter 148 inserted subd. (1)(m); and made minor changes in phraseology.

The 1979 amendment substituted "15%" for "1 ½%" in the first sentence of subd. (1)(m); and substituted "market values" for "limitations" in the third sentence of subd. (1)(m).

Effective Date.

Section 2 of Laws 1979, ch. 172 provided: "This act shall take effect July 1, 1979."

49-9-13. Budget. The director shall prepare an annual administrative budget covering the anticipated administrative costs of [the] Utah state retirement office for the forthcoming fiscal year and present the same to the Utah state retirement board for its examination and approval. Upon approval by the board the budget shall be submitted to the governor and the legislature for their examination and approval.

History: L. 1963, ch. 74, § 13; 1965, ch. 86, § 1; 1969, ch. 124, § 1.

Compiler's Notes.

The 1965 amendment rewrote this section which previously provided for payment and proration of administrative expenses by the board, assessment of members of retirement systems without funds, and approval of the administrative budget of the retirement office.

The 1969 amendment substituted "and the legislature for their examination and approval" in the second sentence for "for his review and approval and thereafter may be expended as herein provided"; and deleted a sentence providing for adjustment of the budget in the event of new or unanticipated programs.

The bracketed word was inserted by the compiler.

Repealing Clause.

Section 2 of Laws 1969, ch. 124 provided: "Section 49-10-54, Utah Code Annotated 1953, as enacted by chapter 106, Laws of Utah 1957, is hereby repealed."

Effective Dates.

Section 2 of Laws 1965, ch. 86 provided that the act should take effect upon approval. Approved March 18, 1965.

Section 3 of Laws 1969, ch. 124 provided: "This act shall take effect on July 1, 1969."

UTAH CODE

ANNOTATED

1986 Cumulative Supplement

REPLACEMENT VOLUME 5B

1981 EDITION

Titles 47 to 53

THE MICHIE COMPANY

LAW PUBLISHERS
CHARLOTTESVILLE, VIRGINIA

Place this supplement with the corresponding volume of the set, and remove the previous pamphlet, which may be retained for reference.

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- Responsibilities — Em-

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single sentence substituting "who
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"as follows" in the second sentence of the introductory paragraph; deleted "to administer" at the end of Subsection (2); deleted "and regulations as are deemed necessary or desirable, and" after "rules" in Subsection (3); substituted "of the budget" for "thereof" in Subsection (8); deleted "as is deemed necessary" after "consultants" and "for administration" after "office" in the first sentence of Subsection (9); deleted "as may be necessary" after "assistants" in the second sentence of Subsection (9); added "and shall not be subject to Section 67-8-3" at the end of Subsection (9); and made minor changes in phraseology and punctuation.

Right to appoint attorneys.

The attorney general does not have exclusive constitutional authority to act as legal adviser to the state retirement board; therefore, the provision of this section authorizing the appointment of attorneys does not violate Art. VII, § 16 of the state constitution; furthermore, this section provides an exception to the general authority of the attorney general to perform legal services for any agency of state government. Hansen v. Utah State Retirement Bd. (1982) 652 P 2d 1332.

49-9-12. Investment of funds — Unrated securities — Investments not subject to control of board.

(1) The retirement board may invest, subject to the standard of a prudent man dealing with the property of another, any and all funds assigned to it as set forth as follows:

(a) Bonds or other evidences of indebtedness of the United States or any of its agencies or instrumentalities when such obligations are guaranteed as to principal and interest by the United States.

(b) General obligation bonds or other evidence of indebtedness of any state, or of any county, incorporated city, town or school district of the state or territory of the United States, provided said bonds are at the time of purchase rated within the three highest classifications established by at least one standard rating service.

(c) Bonds, notes or evidence of indebtedness of any county, municipality, or municipal district utility within the United States, which are payable from revenues or earnings specifically pledged for the payment of the principal and interest on such obligations, provided that said revenue bonds are at the time of purchase rated within the three highest classifications established by at least one standard rating service.

(d) Bonds, debentures or other evidences of indebtedness issued, assumed or guaranteed by any solvent corporation or institution created or existing under the laws of the United States or of any state, district or territory thereof, which are not in default as to principal or interest, provided that said bonds at the time of purchase are rated within the three highest classifications established by at least one standard rating service.

(e) Equipment trust obligations or certificates secured by an interest in transportation equipment wholly or in part within the United States which carry the right to receive determined portions of rental, purchase or fixed obligatory payments to be made for the use or purchase (or fixed obligatory payments to be made for the use or purchase) of such transportation equipment, provided that said obligations are at

the time of purchase rated within the three highest classifications established by at least one standard rating service.

(f) Securities of any open-end or closed-end management type investment company or investment trust, participation in common trust funds or shares, preferred or guaranteed stock, and nonassessable common stock or shares of any solvent corporation or institution created or existing under the laws of the United States or any state, district or territory thereof, provided that said stocks are at the time of purchase rated within the three highest classifications established by at least one standard rating service.

(g) Obligations issued or unconditionally guaranteed by international development lending institutions of which the United States is a member and whose obligations are qualified for investment by national banks.

(h) Real estate mortgages secured by Federal Housing Administration (FHA) or Veterans Administration (VA) insurance or guaranteed commitments or notes secured by mortgages or trust deeds on real estate which are guaranteed as to payment of interest and principal by a corporation, approved by the state commissioner of insurance, which is licensed to do business in the state of Utah as an insurer and which has assets of $50 million or more and that the corporation insurance exposure at the time of note purchase is limited to not more than 25 times the value of capital, surplus and contingency reserves.

(i) Saving deposit or certificate of deposit of a bank insured by the Federal Deposit Insurance Corporation, or to the extent that they are insured in shares or accounts of either state chartered or federal chartered savings and loan and building and loan associations which are insured by the Federal Savings and Loan Insurance Corporation.

(j) The interest in or portion of notes, obligations or other written evidence of indebtedness used as collateral for loans and which are guaranteed by any authorized agency of the United States government as to payment of principal, interest or rents.

(k) Bonds or other evidence of indebtedness issued or guaranteed by an agency or instrumentality of the United States, including, but not limited to, the guaranteed portion of loans guaranteed by any such agency or instrumentality.

(l) Unrated securities which would otherwise qualify for purchase by the board under subsections (1)(b), (c), (d), (e) or (f) of this section, where such unrated securities are found by the board to be of a quality equal to securities rated within the three highest classifications as required of rated securities.

(m) Real estate for the production of income and use not to exceed 15% of the book value of the investment portfolio. Buildings may be purchased or land acquired and new buildings constructed. At least

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two certified appraisals are required for purposes of determining portfolio market values.

(n) Any other investment in which a prudent man dealing with the property of another would invest.

(2) Investments shall not be subject to the control of the board of examiners.

History: L. 1963, ch. 74, § 12; 1965, ch. 86, § 1; 1973, ch. 98, § 3; 1975, ch. 91, § 3; 1975, ch. 148, § 1; 1979, ch. 172, § 1; 1983, ch. 217, § 1.

Compiler's Notes. — The 1983 amendment inserted "subject to the standard of a prudent man dealing with the property of another" in subsec. (1); and added subsec. (1)(n).

49-9-14. Life, health, and medical insurance benefits — Definitions — Duties of State Retirement Office — Funds — Report.

The purpose of this chapter is to provide a mechanism whereby the state of Utah and its political subdivisions may provide their employees group health, medical, disability, and life insurance in the most economical and efficient manner. The Legislature intends that beginning July 16, 1977, the state employees' group health and medical insurance shall be established on a self-funded and actuarially sound basis.

The board may assist active and retired members and beneficiaries and inactive members of the various retirement systems administered under its direction, to purchase life, health, and medical insurance on a group basis which can be continued after retirement under such rules as the board may adopt. The director may employ any personnel, including consultants, as may be needed to carry out the provisions of this section.

(1) As used in this chapter:

(a) "Employee" means any employee of any department, agency, division, institution of the state of Utah, and its political subdivisions.

(b) "Employer" means the state of Utah, its departments, agencies, divisions, and political subdivisions.

(c) "Employee group benefit plans" means any group health, medical, disability, or life insurance program administered by the Utah State Retirement Board and approved by the Legislature for employees of the state of Utah and its political subdivisions.

(2) The State Retirement Office is charged with the following duties and responsibilities:

(a) to act as a self-insurer of employee group benefit plans, administer those plans, enter into contracts with private insurers to underwrite employee group benefit plans, and to reinsure those portions of self-insured plans as considered appropriate;

Tab F

CHAPTER 37
MORTGAGE FORECLOSURE

78-37-1. Form of action — Judgment — Special execution.

There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of mortgaged property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and a special execution or order of sale shall be issued for that purpose.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-37-1; L. 1965, ch. 172, § 1.

Cross-References. — Execution and proceedings supplemental thereto, Rule 69, U.R.C.P.

Trust deeds, § 57-1-19 et seq.

NOTES TO DECISIONS

ANALYSIS

Action for deficiency.

Former statute held not bar to action at law for deficiency remaining after sale under power in trust deed failed to realize full amount of note secured by such deed. Mallory v. Kessler, 18 Utah 11, 54 P. 892, 72 Am. St. R. 765 (1898).

Applicability of section.

Pledge was not mortgage within meaning of former § 104-55-1. Campbell v. Peter, 108 Utah 565, 162 P.2d 754 (1945).

The rights of a creditor secured by a pledge of personal property are governed by the Uniform Commercial Code, not this section. Kennedy v. Bank of Ephraim, 594 P.2d 881 (Utah 1979).

This section applies only to actions between mortgagors and mortgagees and was not applicable in a suit by mortgagee for an accounting against the purchaser of mortgaged personalty. Pillsbury Mills v. Nephi Processing Plant, 5 Utah 2d 286, 323 P.2d 266 (1958).

EXHIBIT NO. F